UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA :

- v. - :

BENJAMIN WEY, :
a/k/a "Benjamin Wei," 15 Cr. 611 (AJN)
a/k/a "Tianbing Wei," and :
SEREF DOGAN ERBEK,
a/k/a "Dogan Erbek," :

Defendants. :

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SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

The Government respectfully submits this supplemental memorandum of law in opposition to defendant Benjamin Wey's motion to suppress evidence. The evidence elicited at the hearing on January 23 and 24, 2017 (the "Hearing") establishes that the Government acted in good faith in executing the January 25, 2012 searches of the offices of New York Global Group, Inc. ("NYGG") and Wey's residence, and that the Government acted reasonably and in good faith in executing its off-site searches of computers and other electronic devices seized from those locations.

Though the Government continues to advance all of the arguments set out in its July 8, 2016 opposition to Wey's motion to suppress, this supplemental memorandum focuses only on the issues of good faith, set out above and in the Court's November 28, 2016 order setting the Hearing. As discussed in detail below, the applications for the warrants were highly detailed and thorough and set out the relevant statutory citations, the lead prosecutor personally briefed the agents prior to the search to ensure they understood the investigation and the warrant's parameters, and the case agent was present for both searches and answered other agents' questions about whether specific documents were embraced by the warrants. In addition, the Government reviewed the electronic evidence carefully and diligently, with an eye toward avoiding potentially privileged information—searching the seized electronic material for the names of hundreds of lawyers provided by counsel—and seizing only those items that fell within the scope of the warrants. The evidence elicited at the Hearing therefore provides the Court with another basis on which to deny Wey's motion.

I. The Evidence at the Hearing

A. The Preparation for the Search

1. Drafting the NYGG Search Warrant Application

Then-Assistant U.S. Attorney ("AUSA") David Massey testified that he took the lead in drafting the NYGG search warrant application (the "NYGG Application") and search warrant (the "NYGG Warrant"). (Tr. 6; GX 2, 3). He did so with help from FBI Special Agent Matthew Komar, who at that time was the case agent on the investigation (Tr. 14, 120-21). In January 2012, Massey had been an AUSA for over seven years, and had been assigned to the Securities and Commodities Fraud Task Force for about one year leading up to the January 25, 2012 searches. (Tr. 4-5.) Komar was at that time assigned to an FBI squad that focused on securities fraud, corporate fraud, and money laundering. (Tr. 119-20).

Massey acknowledged that no statutory citation appeared on the face of the NYGG Warrant (Tr. 12), though the NYGG Application in support of the NYGG Warrant did reference the applicable statutes (GX 2 at [1], 3). In any event, it was "[a]bsolutely" clear to Massey, based on the NYGG Warrant and its attachments, what crimes were being investigated. (Tr. 12). Specifically, Massey pointed to Exhibit A of the NYGG Warrant, noting that in the first paragraph of Exhibit A, "the first types of records that are called for are financial records concerning various individuals, including banking and brokerage firm account statements and the like. In addition, paragraphs 1 and 2 for starters are all about financial transaction records, records of shareholders." (Tr. 12; *see also* GX 3, Ex. A at 1). The NYGG Warrant's reference to such records "certainly indicates a financial or securities fraud as opposed to narcotics or assistance to terrorism or something like that." (Tr. 12). Similarly, Komar understood that he and the search team would be searching NYGG's offices for evidence of securities fraud and wire fraud, as described in the NYGG Warrant's attachments, and he did not doubt the NYGG Warrant's validity. (Tr. 121).

Massey also believed that the NYGG Warrant's scope was justified, based on the pattern and pervasiveness of Wey's fraudulent conduct—described in the NYGG Application—going back more than a decade. Massey testified that the investigation had revealed that NYGG was "permeated by fraud." (Tr. 13). Specifically, "going back to the early 2000s," Wey "had been barred from the securities industry in Oklahoma," and each issuer that NYGG advised "had significant indicia of securities fraud or other fraud, starting with Bodisen Biotech, which had been delisted for failure to disclose its relationship to Ben Wey's entity." (Tr. 13; *see also* GX 2 at 9, 14, 17-18). "Each issue followed the same pattern," which was important because "the way securities fraud and . . . market manipulation schemes tend to work is, there is sort of a playbook and it's sort of a factory. . . . The playbook was being repeated issuer after issuer." (Tr. 13).

Massey also testified that Wey had claimed "that his only income came from the U.S. company New York Global Group USA and that New York Global Group USA's only income or revenue came from its co-branded Chinese affiliate, New York Global Group Asia." (Tr. 14; *see also* GX 2 at 67). That claim "seemed completely implausible, given the amount of money that" the Government knew Wey was "generating from these schemes. And so all the records of New York Global Group, including revenue, expenses and the like were in play." (Tr. 14).

2. The Ops Plan and Massey's Pre-Meeting with the Search Team

Prior to the search, Komar, as is customary, prepared an "operations order form" (the "Ops Plan") and circulated it to the search team. (Tr. 122-23; GX 1). Among other things, the Ops Plan explained that there was probable cause to believe that Wey, acting through NYGG, had "committed securities fraud and manipulated the market for the securities of various small-capitalization issuers." (GX 1 at [1]). Specifically, as set out in the Ops Plan, Wey introduced "Chinese companies to the U.S. markets," "arrange[d] reverse mergers" for those companies, and then helped them "get listed on markets such as NASDAQ." (*Id.*). Wey also "artificially inflated the number of round-lot shareholders for the purpose of meeting listing requirements." (*Id.*). The Ops Plan also explained Wey's undisclosed beneficial ownership of large blocks of shares of the Chinese companies, and the pump-and-dump scheme. (*Id.*). The Ops Plan went on to describe the operation: "The search will be for documents related to Wey assisting Chinese reverse mergers falsify [sic] their records to meet the listing standards for NASDAQ. Wey may have additionally controlled the trading volume in these Chinese companies, through a number of associated broker dealers." (*Id.* at [5]).

Komar also made the NYGG Application available to members of the search team prior to the search. (Tr. 125). Due to the length of the NYGG Application, Massey approached preparing the agents for the search of NYGG similarly to how he would prepare agents for a wiretap. (Tr. 14). Massey's attendance at such a meeting was a precaution beyond the normal course in preparing to execute a search warrant. (Tr. 190, 240). "The agents certainly needed to understand it at a certain level, at least at a very broad level . . . ." (Tr. 14-15). So Massey decided to brief the agents who would be participating in the search, all of whom were on Komar's squad, which focused on securities fraud. (Tr. 15, 119-20, 237). Therefore, the day before the search, Massey went to the FBI's offices and talked the search team "through the affidavit and the investigation and what they were looking for." (Tr. 15, 122, 238-39).

Komar testified that he and Massey wanted to ensure that the search team "was aware of what we were truly investigating," and recalled Massey "going into great detail going through the examples of what we believed the scheme was essentially that we were investigating and communicating what types of documents that we were going to be looking for, expecting." (Tr. 124). FBI Special Agent Thomas McGuire recalled that Massey and Komar "provided an overview of the case and the alleged criminal activities," including that "it was a securities fraud investigation that involved pump and dump schemes, reverse mergers with Chinese companies, concealed ownership interests, market manipulation. This way it was a fairly typical securities fraud case." (Tr. 239; *see also* Tr. 241). The search team also was instructed not to search the office of NYGG's lawyer. (Tr. 131, 239-40).

B. The Search of NYGG

Upon entering NYGG's offices, the search team first brought all NYGG employees into a conference room and interviewed some of them. (Tr. 127, 243). The search-team agents had copies of the NYGG Warrant during the search. (Tr. 127, 244). Komar searched the reception area of NYGG, because it was a central area and made him available for questions from others conducting the search. (Tr. 128; *see also* Tr. 246 (McGuire describing his practice of asking the case agent questions)). In fact, Komar answered "numerous questions" and instructed agents not to seize at least two items or to seize only a representative sample. (Tr. 128, 130-31). McGuire also left behind documents that were not embraced by the NYGG Warrant. (Tr. 245-47). Komar explained that it would have been unhelpful to seize material outside the scope of the NYGG Warrant, because "[i]t is burdensome to go through documents that aren't relevant to an investigation." (Tr. 132-33).

Due to the limited number of documents they found, agents were able to review the paper material very carefully while at NYGG's offices. (Tr. 133-34, 245, 249). In addition, Komar was able to double-check what agents had seized and where they had searched, "to make sure that we were organized and taking what we needed and only what was relevant." (Tr. 133). Electronic media were seized or imaged on-site. (Tr. 134-35). Agents seized approximately 4500 pages from NYGG. (Tr. 133).

During the search of NYGG, agents learned that Michaela Wey was an NYGG office manager and maintained NYGG records at the Wey's residence (the "Residence"). (Tr. 16, 135). Based in large part on that information, the Government sought a search warrant for the Residence. (Tr. 17, 136).

C. The Search of Wey's Residence

Massey also took the lead in drafting the Residence search warrant application (the "Residence Application," and collectively with the NYGG Application, the "Applications") and search warrant (the "Residence Warrant," and collectively with the NYGG Warrant, the "Warrants"). (Tr. 17; GX 9, 10). Massey again acknowledged that no statutory citation appeared on the face of the Residence Warrant (Tr. 17), though the Residence Application in support of the Residence Warrant did so (GX 9 at [1], 3). It was nevertheless clear to Massey, based on the Residence Warrant and its attachments, what crimes were being investigated, for the same reasons it was clear based on the NYGG Warrant and its attachments. (Tr. 18). For his part, Komar did not doubt the validity of the Residence Warrant, which described what the agents were allowed to take in its Exhibits A and B. (Tr. 137).

The breadth of the Residence Warrant was justified because Michaela Wey, NYGG's nominal or actual owner and Wey's wife, "was doing the bookkeeping for a complicated entity from the" Residence. (Tr. 18). Therefore,

> any or all financial records relating to New York Global Group, at a minimum, would be . . . validly within the scope of a search warrant because there is probable cause to believe that any of those records could be evidence of a crime. In addition, it was clear that there is a direct connection between the personal finances of Michaela Wey, who lived at that apartment, and Ben Wey; a nominee shareholder named Tianyi Wey, the sister of Ben Wey. The proceeds of the crime . . . appeared to be coming from offshore back into the U.S. and at least some cases in the form of wire transfers from Tianyi Wey to Michaela Wey and into one or more accounts that were used to pay personal expenses or credit cards.

(Tr. 18; *see also* GX 2 at 12-13, 56-57, 72, 86 (discussing wire transfers from Tianyi Wei to Michaela Wey); GX 9 at 7-8).

Michaela Wey was present during the search of the Residence, and her and/or Wey's lawyer, John Bostany, arrived at some point during the search. (Tr. 20-21, 145). During the search, Bostany told Massey that certain documents in the Residence potentially were privileged, so Massey allowed Bostany to take those documents from the Residence. (Tr. 20, 145-46).

The search of Residence began around 4:30 p.m. and concluded around 9:00 p.m. (Tr. 138, 257; GX 12). During the search, Komar again took questions from other agents concerning whether particular documents fell within the Residence Warrant's scope. (Tr. 139). The search team focused its efforts on an office area inside the Residence (Tr. 139), though they also found torn documents—including some in a foreign language—comingled with trash inside a garbage bag, inside a suitcase, inside a closet (Tr. 142-43, 168-69, 216-18; GX 15-D, 22, 22-A), and a torn document—describing, among other things, Wey's lawyers, accounts, and trusts—inside a waste-paper basket (Tr. 143; GX 15-H, 20). Agents also found a safe inside the Residence, which Michaela Wey opened. (Tr. 256). The agents seized nothing from the safe. (Tr. 256).

Komar was candid that the search team was not able to go through every piece of paper in the Apartment. (Tr. 146). Had they done so, the agents "would have been there for three to four days, probably." (Tr. 146). The agents "were at someone's residence" whose "family was expected back," leading to "a sense of urgency that we didn't want to disrupt someone's life." (Tr. 146). Indeed, Michaela Wey "was upset about the search because it's a very slow process." (Tr. 257). Toward "the end of the search there was some tension because she [i.e., Michaela Wey] wanted the search to wrap up. Understandably, she wanted us out of her apartment." (Tr. 257).

Agents therefore "decided to flip through a box, see if there are relevant documents," and if so to take "that box pursuant to the search warrant." (Tr. 146). Komar described the process: Agents would look through the folders inside a box and see what they contained. (Tr. 146-47). If a folder contained bank statements, for example, and there were other folders containing bank statements labeled with different dates, agents would quickly flip through the documents to ensure they understood what they were taking. (Tr. 147).

D. The Review of the Seized Electronic Material

1. Forensic Imaging and Processing of the Seized Electronic Material

After the searches, the seized electronic material (the "Electronic Material") was transmitted to the FBI's computer forensics lab for imaging and processing. (Tr. 20-21, 148). Massey directed the FBI to make copies of the Electronic Material so that the originals could be returned expeditiously to NYGG, to avoid needlessly inhibiting the business's ongoing operations. (Tr. 21, 148 (noting that the electronic devices were returned except for certain thumb drives)).

2. Segregation of Potentially Privileged Materials

Once the Electronic Material was forensically processed, the Government could not immediately begin a substantive review because it was aware that the Electronic Material might include potentially privileged materials. (Tr. 22, 149). Accordingly, the Government devised a process to ensure that members of the prosecution team did not access material protected by the attorney-client privilege. (Tr. 22, 149). Massey compiled a list of attorneys' names that had been identified during the course of the investigation so that those names could be searched in the Electronic Material and segregated for a privilege review. (Tr. 22, 280). Massey also sought input from NYGG counsel for that purpose. (Tr. 22-23; *see also* GX 17 (June 4, 2012 correspondence from NYGG providing list of attorneys); GX 18 (list of attorneys which incorporates attorneys provided by defense counsel on May 7, June 4, and August 7, 2012)). Counsel for NYGG provided the Government with lists of hundreds of attorneys for use in the privilege review throughout the late spring and summer of 2012. (GX 17, 18).

In or about June 2012, after the process of obtaining a list of attorneys was nearly complete, the prosecution team endeavored to locate and segregate potentially privileged material within the databases. (Tr. 150-51). The FBI assigned a team of three wall agents to conduct searches throughout the electronic databases to attempt to identify potentially privileged materials, and the Government designated a wall prosecutor and paralegal to assist in the evaluation of the segregated materials.[1] (Tr. 24, 150, 280). The process of searching the databases proved time-consuming, not only because of the speed of the server (*see* Tr. 290-91), but because, in many instances, the agents had to perform a detailed review of the search term hits to determine whether the item was in fact potentially privileged (Tr. 150).[2]

Komar testified that he believed the process of identifying potentially privileged materials was completed in or about December 2012, but that, prior to that month, he had been provided on a rolling basis access to certain screened, cleared, non-privileged materials. (Tr. 152). Although Komar started to perform some substantive review to identify documents that were responsive to the Warrants, he did not progress very far before being reassigned to another FBI field office in February or March 2013. (Tr. 152-53).

In early 2013, McGuire assumed the role of lead case agent on the investigation. (Tr. 279). McGuire took appropriate steps to get up to speed on the details of the investigation, including determining the status of the review of the Electronic Material. (Tr. 279). In contrast to Komar, McGuire recalled that at the time he took over as case agent, the privilege review of the voluminous Electronic Material was ongoing, and that he could not yet begin a substantive review of those materials. (Tr. 279-80). McGuire believed that the laborious process was completed sometime in early 2013 but no later than March, as that was the time he recalled being given access for substantive review. (Tr. 281).

[1] McGuire noted that the Government, at the request of defense counsel, never conducted an additional review of that portion of the Electronic Material segregated as potentially privileged, pending the outcome of motion practice. (Tr. 294).
[2] Massey recalled that certain Electronic Material identified as responsive and non-privileged was shared with the prosecution team on a rolling basis prior to the completion of the privilege review, such as excel spreadsheets containing financial information. (Tr. 25).

3. Substantive Review of the Electronic Material

Both Massey and McGuire explained the process devised to perform the substantive review of the Electronic Material. Given the large volume of Electronic Material, Massey developed a list of search terms, which he provided to McGuire to facilitate McGuire's review of the Electronic Material via the databases. (Tr. 25-26, 282, 284; GX 19 (search term list dated May 3, 2013)). Massey prepared the search-term list, which included over 400 terms, based on the NYGG and Residence Applications and Exhibit B to the Warrants, but included additional terms that further described individuals and entities identified therein and were designed to locate items responsive to the Warrants. (Tr. 26-27; GX 19). Accordingly, the list of search terms was not identical to Exhibit B to the Warrants.

McGuire testified that Massey told him that Massey had added additional search terms that he (Massey) believed would lead to the discovery of documents covered by the Warrants. (Tr. 283). Prior to initiating his review, McGuire reviewed the search-term list and confirmed that he agreed that the terms were likely to lead to the discovery of responsive documents under the terms of the Warrants. (Tr. 283; GX 21 (McGuire stating in email to AUSAs, "Before running the search terms, I will reread the SW [i.e., search warrant] and make sure all search terms are designed to locate responsive documents")).

In early May 2013, McGuire began the process of running the search terms through the database.[3] (Tr. 284). McGuire soon discovered that the volume of materials and speed of the server made it difficult to conduct the electronic review from his office in Manhattan. (Tr. 284). Accordingly, he traveled to an FBI facility in New Jersey, where the server was located, to

[3] McGuire testified that he was not aware of Komar having performed any previous searches of the Electronic Material in the databases, but was aware that Komar had performed some limited searches of some of the seized cellphones. (Tr. 308).

conduct his review. (Tr. 284-85). For each term on the list, McGuire would run a search in the database; each search took approximately two to three minutes to complete, given the speed of the server. (Tr. 290). Then, McGuire would skim through the search results to determine whether the search for the particular term had in fact resulted in documents responsive to the Warrants. (Tr. 290, 292-94). If a search for a particular term resulted in responsive materials, he would tag those materials for provision to the prosecutors. (Tr. 291).

McGuire also noted that the Electronic Material was maintained in two separate databases, one for Electronic Material seized from NYGG, the other for Electronic Material seized from the Residence. (Tr. 290). Accordingly, McGuire had to perform each search twice, once in each database. (Tr. 290). This time-consuming process took approximately 10 full work days to complete and spanned from May to September 2013. (Tr. 286, 291; GX 16 (containing detailed notes of McGuire's review)). Nonetheless, McGuire recalled that he undertook his review of the NYGG and Residence databases seriatim, so that he was able to provide the prosecutors with the responsive documents from one of the locations in June or July 2013. (Tr. 291). McGuire's review resulted in approximately 14,000 responsive documents from the apartment and approximately 90,000 from the office. (Tr. 291-92). McGuire further explained that no one on the prosecution team had run new searches on the original electronic material since that time. (Tr. 292).

McGuire also testified that, due to a perceived computer problem in one of the electronic databases, it appeared that the "tagging" he had performed for responsive documents had been lost. As a result, and to avoid any concerns with re-searching the entirety of the Electronic Materials, a wall agent, FBI Special Agent Elizabeth Miller, was asked to attempt to identify those documents that had previously been tagged. Regardless, prior to the use or review of any of the items Miller had located, the computer problem was corrected and Miller's search was not used and resulted in no new documents being identified as within the Warrants' scope. (Tr. 337-41, 359-61).

ARGUMENT

The evidence at the Hearing established that the search team acted in good faith in executing the Warrants. Based on contemporaneous supporting documents, the agents clearly understood the crimes to which the Warrants applied, and did not search for items other than those they would have had the Warrants referenced the statutes. In addition, the Government acted reasonably and in good faith when searching the Electronic Materials. The Government moved through the materials deliberately, sensitive to avoiding potentially privileged materials, and developed specific search terms to identify documents captured by the Warrants. For these reasons, as well as those advanced in the Government's initial opposition to Wey's motion, the Court should deny the motion.

I. The Agents Understood the Scope of the Warrants, and Acted in Reasonable Reliance on Them

A. The Agents Understood the Crimes Under Investigation

Wey argues that the Warrants lacked particularity in part because "[n]o criminal code section is referenced on their faces." (Def. Mem. at 31). However, the Applications in support of the Warrants did reference the applicable statutes. (GX 2 at [1], 3; GX 9 at [1], 3; *see also* Tr. 125 (Komar made the NYGG Application available to the search team)). And it was "[a]bsolutely" clear to Massey, based on the NYGG Warrant and its attachments, what crimes were being investigated. (Tr. 12). For example, the first paragraph of the NYGG Warrant's Exhibit A called for "financial records concerning various individuals, including banking and brokerage firm account statements and the like. In addition, paragraphs 1 and 2 for starters are all about financial transaction records, records of shareholders." (Tr. 12; *see also* GX 3, Ex. A at 1). In addition, the Warrants explicitly mention fraud, calling for "[d]ocuments reflecting the ownership by the individuals and entities listed in Exhibit B of real properties and personal property purchased with the proceeds of fraud. . . ." (GX 3 at [4] (Exhibit A at 2); GX 10 at [4] (same)). The Warrants' reference to such records "certainly indicates a financial or securities fraud as opposed to narcotics or assistance to terrorism" or the like. (Tr. 12).

Further demonstrating any lack of confusion was the fact that the FBI agents constituting the search team were all members of an FBI squad that focused on securities fraud (Tr. 15, 119-20, 236-37), and therefore would have understood they were searching for evidence of securities fraud even if that had not been made explicit. But it was. The Ops Plan explained that Wey, acting through NYGG, had "committed securities fraud and manipulated the market for the securities of various small-capitalization issuers," and was explicit that "[t]he search will be for documents related to Wey assisting Chinese reverse mergers falsify [sic] their records to meet the listing standards for NASDAQ. Wey may have additionally controlled the trading volume in these Chinese companies, through a number of associated broker dealers." (*Id.* at [1, 5]).

Despite the logical, basic inference from its Exhibits that the NYGG Warrant called for evidence of securities and wire fraud, despite the agents' expertise and focus on precisely those crimes, and despite the NYGG Application's and Ops Plan's explicitness, Massey nevertheless took the extraordinary step of participating in a pre-search briefing, at which he described the investigation and the NYGG Warrant, in order to be absolutely sure that the search team understood the scope of the NYGG Warrant. (Tr. 14-15, 122, 124, 238-39).

In addition, Komar, who helped prepare the NYGG Application (Tr. 14, 120-21), was present at both searches. Komar answered other agents' questions about what was and was not covered by the Warrants. (Tr. 128, 130-31, 139). Komar also took efforts to double-check what other agents had seized from NYGG, to be certain both that they had conducted a thorough search, and that they had not seized anything outside the Warrants' scope. (Tr. 133).

The Second Circuit's recent decision in *United States* v. *Romain*, 2017 WL 442175 (2d Cir. 2017) (summary order), is on point. Romain argued that a search "warrant was insufficiently particular because the text of the warrant itself, as opposed to the supporting documents submitted with the warrant application, did not reference the criminal statutes he was charged with violating," and that "this deficiency was so obvious that the good faith exception to the exclusionary rule should not apply." *Id.* at *1. The court of appeals disagreed, concluding that Romain's argument that the warrant "was so facially deficient that reliance upon it was unreasonable" was foreclosed by *United States* v. *Rosa*, 626 F.3d 56 (2d Cir. 2010). *Romain*, 2017 WL 442175, at *2 (internal quotation marks and alteration omitted).

In *Romain*, "as in *Rosa*, the supporting documents but not the warrant itself detailed the relevant criminal offenses being investigated and described the relationship between those crimes and the search sought to be conducted." *Romain*, 2017 WL 442175, at *2. But "the agent who reviewed the contents of the device seized and prepared the warrant and supporting materials did not search items other than what he would have searched had the Warrant referenced the statute." *Id.* (internal quotation marks and alteration omitted). There was

> no argument that law enforcement's failure to cite the relevant criminal statutes or timeframe in the warrant when contemporaneously submitted supporting documents included this information was sufficiently deliberate that exclusion can meaningfully deter such a failure, and sufficiently culpable that such deterrence is worth the price paid by the justice system.

Id. (internal quotation marks and alteration omitted).

Here, Massey and Komar went to great lengths to ensure that the agents executing the Warrants understood the Warrants' scope and the crimes under investigation, including, as described above (1) making available the NYGG Application, which cited the relevant statutes under investigation, (2) writing a detailed Ops Plan that described the scheme and items to be seized, (3) briefing the agents prior to the search, (4) and taking questions during the searches themselves. In light of those efforts, the Warrants' failure to cite the relevant criminal statutes was neither "sufficiently deliberate that exclusion can meaningfully deter such a failure," nor "sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* (internal quotation marks and alteration omitted).

B. The Agents Executed the Searches in Good Faith

In addition, the agents executed the searches in good faith. As described above, during the searches Komar answered other agents' questions about what was and was not covered by the Warrants (Tr. 128, 130-31, 139), and took efforts to double-check what other agents had seized from NYGG (Tr. 133). At NYGG, due to the limited number of paper documents they found, agents were able to review those records very carefully before deciding whether to seize them. (Tr. 133-34, 245, 249). Electronic devices at both locations were seized or imaged on site due to volume. (*See* Tr. 135). The Government even allowed the Weys' lawyer to leave the Residence with documents the lawyer asserted might contain privileged information. (Tr. 20, 145-46).

Again, Komar was candid that agents were not able to go through every page of the records they found in the Residence. (Tr. 146). The search team was sensitive to the fact that they were in the Weys' home late in the evening, that the Weys' children could not return until the agents had finished their search, and that Michaela Wey was understandably upset about the deliberate pace of the search. (Tr. 146, 255-57). Nevertheless, even under this pressure to conclude their search, agents did not simply indiscriminately take boxes. Rather, agents would, for example, look through the folders inside a box and see what they contained. (Tr. 146-47). If a folder contained bank statements, for example, and there were other folders containing bank statements labeled with different dates, agents would quickly flip through the documents to ensure they understood what they were taking. (Tr. 147).

This explains why the agents accidentally removed from the Residence two x-rays of Michaela Wey. (Tr. 272, 277; GX 23-C (box containing the x-rays, among other documents)).[4] Though that was a mistake, it was not an unreasonable one or made in bad faith. The x-rays were in envelopes inside a box comingled with material embraced by the Residence Warrant, such as financial records, a corporate resolution, payroll statements, and checks. (Tr. 272-77; GX 23-C). The Court can easily infer that the seizing agent merely (though unfortunately) missed the x-rays inside the box, not that the agent deliberately chose to ignore the Residence Warrant's scope and knowingly seized the x-rays.

Along similar lines, defense counsel showed witnesses different pharmacy-type records seized from the Residence. (*E.g.*, Tr. 55, 167). However, those documents were found in the trash, along with torn documents in a foreign language and food waste, inside a garbage bag, inside a suitcase, inside a closet. (Tr. 142-43, 168-69, 216-18; GX 15-D, 22, 22-A). Wey is wrong to fault the agents for seizing the entire contents of the bag, where the circumstances were suspicious, and the bag contained torn documents in a foreign language that had to be reassembled for translation. (*See* Tr. 217).

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[4] At times, the transcript erroneously identifies Exhibit 23-C as "Exhibit 3-C." (*E.g.*, Tr. 272).

For all of the foregoing reasons, the agents executed the searches in good faith, and the Court should deny Wey's motion.

II. The Government Acted Reasonably and in Good Faith in Searching the Electronic Material

The Government also acted reasonably and in good faith in searching the seized Electronic Material. In short, the evidence establishes that the facts of this case are nothing like *United States* v. *Metter*, 860 F. Supp. 2d 205 (E.D.N.Y. 2012), upon which Wey relies. In *Metter*, "the government had promised to review the evidence seized offsite to determine whether any evidence fell outside the scope of the warrants," but "then failed to commence the review, despite repeated requests from defense counsel and directions from the Court to do so." *Id.* at 216. The Government's "conduct and statements" in *Metter* indicated "that it had no intention of fulfilling its obligations as promised in the search warrants," and the Government there presented no "evidence or arguments to the effect that it failed to fulfill this obligation due to limited resources, such as it has argued in other cases." *Id.*

Here, in contrast, the Government at all times acted entirely reasonably, and any delay was the result of a lengthy privilege review and lack of resources, not an unwillingness to undertake an appropriate review of the Electronic Material. First, the FBI promptly imaged the Electronic Material and returned images or originals to NYGG and Wey, to avoid needlessly disrupting NYGG's ongoing operations. (Tr. 20-21, 148). At that point, however, the Government could not begin reviewing the Electronic Material because Wey, through counsel, asserted that the Electronic Material contained potentially privileged information. (Tr. 22, 149). Wey's counsel submitted various lists of lawyers to the Government, including a list submitted on June 4, 2012 containing hundreds of names, including that of Michaela Wey. (GX 17.) The Government therefore created a filter team of three agents, an AUSA, and a paralegal. (Tr. 24, 150-51, 280). The process of searching the databases proved time-consuming because of the speed of the server and because, in many instances, the agents had to perform a detailed review of the search term hits to determine whether the item was in fact potentially privileged. (Tr. 150). Nevertheless, the filter team provided pertinent, non-privileged information to the prosecution team on a rolling basis. (Tr. 25, 152).

Before being reassigned to another FBI office in February or March 2013, Komar began to review the non-privileged Electronic Material for items responsive to the Warrants, though he admitted that he did not get far. (Tr. 152-53). McGuire began searching the Electronic Material in early May 2013, using search terms Massey had provided to him. (Tr. 283-84; GX 19). McGuire described in detail the laborious, time-consuming process by which he had to search the Electronic Materials, in which each search took the computer minutes to run, and had to be run twice—because the Electronic Materials seized from NYGG were on one database, and those seized from the Residence were on another. (Tr. 284-86, 290-94; GX 16 (McGuire's detailed notes on the search terms)). Nevertheless, McGuire worked diligently to search the Electronic Material and eventually finished in June or July 2013, having identified as within the scope of the Warrants 14,000 documents from the Electronic Materials seized from the Residence, and another 90,000 from the Electronic Materials seized from NYGG. (Tr. 292). Therefore, approximately 17 months after seizing the Electronic Materials—and despite receiving lengthy lists of attorneys for privilege review as late as June 2012—the Government had segregated privileged documents and completed its review of the remaining Electronic Materials, in contrast to *Metter*, where the Government had not even begun its review 15 months after the seizure, 860 F. Supp. 2d at 211.

Wey seemed to suggest at the Hearing that it was inappropriate for McGuire, in the summer of 2015, to ask filter-agent Miller to look for certain pertinent documents McGuire had already found in the Electronic Material, in response to a computer problem that he believed had erased the results of McGuire's painstaking search and eliminated the tags identifying which items within the Electronic Material were (1) potentially privileged, and (2) within the Warrants' scope, respectively. (Tr. 336-42). Far from being unreasonable, McGuire employed Miller for this task specifically to avoid a member of the prosecution team being exposed to privileged material. (Tr. 337-38). In any event, prior to the use or review of any of the items Miller had located, the computer problem was corrected and her work was not used. (Tr. 337 (describing that the problem was fixed and the items were "exported . . . based on the original bookmark), 359-61). Therefore, even assuming Miller's search was inappropriate—and it was not—Wey was not prejudiced.

The Government therefore acted reasonably and in good faith in searching the Electronic Material, and the Court should deny Wey's motion.

CONCLUSION

The Court should deny Wey's motion to suppress.

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Respectfully submitted,

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